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No. 93-1120

In The

Supreme Court of the United States

October Term, 1993

REMGRIT CORPORATION,

Petitioner,

v.

REMINGTON ARMS CO., INC., and
E.I. DU PONT DE NEMOURS AND COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its discretion in disposing of Petitioner's appeal in an opinion that did not provide detailed reasoning on each of the eleven (11) issues raised by Petitioner.

2. Whether the trial court abused its discretion in not correcting an alleged technical error in the jury form where that error was not material and not prejudicial in light of the entire circumstances surrounding its submission to the jury.

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STATEMENT OF THE CASE

This is a diversity action filed in February 1988, in the United States District Court for the District of South Carolina (Charleston Division) by Remgrit Corporation (Remgrit) against Remington Arms Company (Remington)[1] and E. I. du Pont de Nemours and Company (Du Pont).[2] The complaint sought unspecified damages arising out of an agreement for the sale of Remington's abrasive products business to Remgrit in June 1986. Remgrit claimed breach of warranty and negligent misrepresentation of material facts connected with the business. Remington and Du Pont filed a counterclaim for reimbursement of taxes that should have been paid by Remgrit according to the sale agreement and for $118,413 for the value of transferred inventory. Later, in October 1988, Remgrit was permitted to amend its complaint to seek rescission of its agreement with Remington, to which Remington and Du Pont reasserted their counterclaim.

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[1] During the course of this litigation, Remington was a wholly-owned subsidiary of Du Pont. In December 1993, Remington became an independent company in which Du Pont holds no interest. The interests of Remington in this lawsuit are now represented by Sporting Goods Properties, Inc. , a wholly-owned subsidiary of Du Pont.

[2] There are presently two publicly held entities in which Du Pont, or a subsidiary or affiliated company of Du Pont, owns an interest: Du Pont Canada Inc. is a subsidiary company, and DNA Plant Technology Corporation is a company in which Du Pont holds an indirect minority, non-controlling interest. Du Pont has no parent company, but, in keeping with the spirit of S. Ct. R. 29.1, we note that the Seagram Company Ltd. owns slightly less than 25% of Du Pont common stock.

As part of the sale of the abrasive products business, Remington transferred to Remgrit its 17 outstanding patents related to the abrasive products technology. Only one of these patents was the focus of Remgrit's claims. At trial, Remgrit asserted that there was a breach of the warranty concerning the patents in the Purchase and Sale Agreement. It claimed that after the closing of the sale it learned for the first time that there were other manufacturers of abrasive products tools using the patented technology, and that it was therefore unable to enforce the patent. Nevertheless, the proof showed that Remgrit's president was aware of a competitive study prior to the closing of the deal, and others in Remgrit had knowledge of a suspected infringer prior to the sale of the business.

After lengthy discovery, trial to jury began on February 27, 1990. Immediately before trial, the district court granted Respondents' motion for partial summary judgment, holding Remgrit liable for taxes paid by Remington. The court reserved the determination of the amount due for taxes until after trial. Trial proceeded through March 16, 1990, when the jury returned a verdict upon special interrogatories for Remgrit on one negligent misrepresentation issue, awarding Remgrit $100,000 in damages, but denying all other relief.

Remgrit filed a motion for new trial, and Respondents sought a judgment notwithstanding the verdict. After submissions to the court as to the award of the amount owed to Respondents for payment of taxes, the trial court issued its order on May 6, 1991, disposing of all post-trial matters. (Pet. App. 11-15). The trial court denied the motions for judgment and new trial, ordering that judgment be entered for Remgrit for $100,000 and for

Respondents for $208,457.29 for reimbursement for taxes. The court further denied costs and pre-judgment interests as to all parties. (Pet. App. 15). Judgment was entered accordingly on May 10, 1991.

Notice of appeal was filed by Remgrit on June 3, 1991, and appellees then filed a timely notice of cross-appeal. After full briefing of the issues, the parties having been granted permission by the court of appeals to extend the lengths of their briefs, oral argument was held on May 4, 1992. On September 20, 1993, the court of appeals issued its opinion affirming the trial court in all respects. (Pet. App. 1-6). Remgrit's motion for rehearing and suggestion for rehearing en banc were denied on October 13, 1993. (Pet. App. 9-10).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN CHOOSING THE FORM OF ITS OPINION

Remgrit claims deprivation of its Fourteenth Amendment[3] due process rights by the failure of the court of appeals to discuss in detail each of the eleven (11) issues it raised below. It is plain from the length of the briefs, the oral argument, and the opinion that the court of

[3] Curiously, Remgrit claims Fourteenth Amendment protection without addressing the threshold issue of state action. In any event, Remgrit did not claim the protections of this provision below.

appeals was well within its discretion to dispose of this case as it did. In any event, Remgrit's argument does not rise to constitutional proportions or otherwise warrant plenary review by this Court.

As this Court recognized in *Taylor v. McKeithen*, 407 U.S. 191, 195 n.4 (1972), the courts of appeals must be given the widest of latitude in fashioning an opinion and in deciding to even write an opinion. See *United States v. Baynes*, 548 F.2d 481, 483 (3rd Cir. 1977). Here, of course, the court of appeals went well beyond the most summary type of affirmance, setting out the operative facts and cataloging the issues raised by both parties. The extent of the consideration is clear on the face of the opinion: "We have considered the briefs and the record in this case and, after oral arguments, are of the opinion that the evidence in the case supports the verdict and that there is no reversible error." (Pet. App. at 6). Litigants before an appellate court can ask for no more than what the court of appeals has done, a comprehensive and deliberate review of their case. Even the most carefully crafted argument of a party deserves no more than was provided.

It is plain from the remainder of Petitioner's argument that it merely wishes to restate arguments made below, none of which merit plenary attention of this Court. (Pet. at 8-17). However, it is clear from its opinion that the court of appeals reviewed the record's testimony and the questions and comments of counsel and the trial court. Petitioner's position plainly is that it still is not satisfied by the verdict. (Pet. App. at 6).

Remgrit complains that it was not allowed to call its patent expert to testify in rebuttal to Remington's expert.

(Pet. at 10, 11). This is simply untrue. Not only was Remgrit allowed to recall its expert to testify in rebuttal to Remington's patent expert, but the trial court offered to recess the trial in order to give Remgrit ample time to arrange for its Chicago patent expert to return to Charleston. What the Court did do was refuse to reverse its pretrial ruling that Remgrit was not entitled to call an *additional* patent expert, whom it had designated after the discovery cutoff.

Remgrit complains that the time limits placed on the presentation of the case were unreasonable. (Pet. at 9, 10). The record will clearly show that Remgrit never made any objection to any aspect of the time limitation imposed by the Court, never proffered to the trial court any specific prejudice, and never asked the trial court to reconsider the limitations imposed. Furthermore, the record will reflect that Remgrit had more than half of its time still available when the case was concluded.

In like manner, Remgrit's allegations regarding the trial court's conduct of the trial, are largely taken out of context. The trial court did express interest in moving the case along, but the record reflects that it did so in an even-handed and absolutely fair manner. Furthermore, Remgrit never made a motion for a mistrial before the trial court based on any issue, much less the points belatedly raised for the first time when the trial was over.

In the end, the court of appeals, after reviewing lengthy record, not only used an appropriate method of deciding this case, but also came to the correct result.

II.

THE ALLEGED JURY INSTRUCTION ERRORS WERE FULLY REVIEWED BELOW AND FOUND TO BE WITHOUT MERIT AND NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION

For the first time, Remgrit now claims deprivation of its Seventh Amendment right to a jury trial by an alleged error in a special interrogatory to the jury, having failed to preserve or argue the constitutional claim below. Remgrit complains that an error in the verdict form caused it great prejudice. Remgrit claims that one word of the special interrogatories that were submitted to the jury was in error in that it called for the jury to make a determination on damages regarding an "overstatement of utilities" when the issue before the jury was whether Remington had understated the utilities that appertained to the site and business being purchased by Remgrit. (Pet. at 19).

It is well settled that formulation of issues and the form of jury interrogatories are committed to the discretion of the trial court. *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1427 (4th Cir. 1985); *Norfolk So. Rw. Co. v. Davis Frozen Foods*, 195 F.2d 662, 666 (4th Cir. 1952). The courts look to whether the interrogatories adequately presented the contested issues to the jury when read as a whole and in conjunction with the general charge, whether submission of the issues to the jury was fair, and whether the ultimate question of fact was clearly submitted to the jury. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir. 1976), *cert. denied*, 429 U.S. 980 (1976).

Although Remgrit now complains about the special interrogatory that was a part of the jury verdict form, the fact is that the jury was properly instructed concerning all issues in their case. As reflected by the fact that even Remgrit agreed to their clarity and offered no objection, the judge's instructions to the jury were absolutely clear in every respect. In response to Remgrit's post-trial motions, the district court, reviewing the evidence concluded that the jury well understood the issue. (Pet. App. at 13).

Remgrit also complains that the district court was in error by instructing the jury that Remgrit could have obtained an injunction for infringement of an acquired patent in a previously settled suit, even if Respondents have been responsible for laches. (Pet. at 21-24). Not only did the courts below fully review this argument, but also Remgrit is completely incorrect. The district court properly instructed the jury that laches would not have prevented Remgrit from obtaining either damages or an injunction with respect to continued infringement of a patent. This is a correct statement of the law. *Jamesbury Corp. v. Litton Indust ial Products, Inc.*, 839 F.2d 1544 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 828 (1988); *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734 (Fed. Cir. 1984).

Remgrit wrongly asserts that the district court instructed the jury that Remgrit could have obtained a preliminary injunction. The district court correctly refused to charge anything regarding Remgrit's alleged inability to obtain a *preliminary* injunction. The court did charge that Remgrit could have immediately *brought a suit* for an injunction. Remgrit quotes the charge (Pet. 21, n.8) but fails to inform this Court that after Remgrit's

request, the district court took great pains to reinstruct the jury that Remgrit could have brought suit only after it had gained sufficient knowledge of infringement to justify a suit for patent infringement.

In light of Remgrit's own unexplained delay of over a year in seeking to enforce its patent rights (which Remgrit never took to a hearing on preliminary injunction), it would have been improper for the jury to attempt to speculate on whether the Respondents' conduct in the early 1970's in fact rendered Remgrit incapable of obtaining a preliminary injunction in 1987. The district court was well within its discretion to find as speculative Remgrit's claim that it was unable to obtain a preliminary injunction, had it ever attempted to do so.

All judges of the district court and the court of appeals who have reviewed these allegations of error in jury instructions have found them to be without merit. There is no basis that would warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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